JD(SF)-63-02
Las Vegas, NV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

BIG SKY LOCATORS, INC.

and **Case 28-CA-17698**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 396, AFL-CIO

Nathan Albright, Esq., Las Vegas, NV, for the General Counsel
Francis J. Morton, Esq., Las Vegas, NV, for the Union
Les Love, Gilbert, AZ, for the Respondent
Arthur J. Bourque, Esq., of Stewart & Bourque, P.C., Phoenix, AZ, on brief for the Respondent

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in Las Vegas, Nevada on June 11 and 12, 2002. The charge was filed by International Brotherhood of Electrical Workers, Local 396, AFL-CIO (Union), on January 23, 2002. On March 28, 2002, the Regional Director for Region 28 of the National Labor Relations Board (Board) issued a Consolidated Complaint and Notice of Hearing alleging violations by Big Sky Locators, Inc. (Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel (General Counsel), counsel for the Union, and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent is a Montana corporation with an office and place of business located in Las Vegas, Nevada where it is engaged in business of providing underground utility locating services primarily to public utilities. In the course and conduct of its business operations the Respondent annually purchases and receives at its Las Vegas, Nevada facility good valued in excess of $50,000 directly from points outside the State of Nevada. It is admitted and I find that the Respondent is and at all material times has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Issues

The principal issue in this proceeding are whether the Respondent has violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and thereafter making unilateral changes without bargaining with the Union.

B. Facts

The Respondent has facilities in Montana, Arizona, California and Nevada. This case involves only the Respondent's Nevada operations. At times material herein the Respondent has had contracts with Southwest Gas Corporation and Nevada Power, the principal gas and electrical public utilities in the state, to locate and mark underground utility lines for contractors or customers of the utilities.[1] Thus, a contractor or customer will notify the utility of a construction project that is being planned or is in progress, and will request that the utility mark the location of its gas or electric service on or adjacent to the construction project. The utility will then call the Respondent to perform the locating and marking work involved.

The Respondent has employed between 12 and 15 employees called "locators," who perform the work outlined above. These employees perform no other work; they work only with a locator instrument, which is a transmitting and receiving device, and with colored markers that are placed at strategic spots above ground to identify the location of the underground lines.

[1] At the time of the hearing herein, however, almost 100 per cent of the work is being performed for Southwest Gas Corporation.

Les Love is the owner and president of the Respondent. Love determined that it would be advantageous for the Respondent's employees, including himself, to be covered by a particular health insurer, Line Construction Benefit Fund (Lineco). This necessitated that the Respondent enter into a collective bargaining agreement with a union, because Lineco provided coverage only to employees covered by a collective bargaining agreement. [2]

Primarily for this purpose, Love first contacted an IBEW construction local in Las Vegas, and was told by the business agent that since the Respondent was not a construction contractor, Love should approach a different local, the Union herein,[3] with the request. Love did so in January, 1999, together with his manager, Brian Marsh, and they spoke with Business Manager Jim Anzinger and Assistant Business Manager Gina Christensen. Love presented the Union representatives with a contract the Respondent then had with IBEW Local 44 in Montana, covering the Respondent's Montana employees, and said that he would like to use it as a pattern for a similar contract with the Union in Las Vegas.

Love was advised by Anzinger and Christensen that the Union would be delighted to represent the Respondent's employees, and that to set the process in motion they needed to speak with the employees because the Union had no desire to represent employees who were not interested in being represented. A meeting was arranged with the employees on January 14, 1999, at the Respondent's premises. [4] All of the employees were present; none of the Respondent's managers were present. Christensen testified that the employees were very receptive to the idea of a union contract. Christensen asked for a show of hands, and testified that "absolutely everybody was unanimously excited about us going forward." After this there were several meetings between the union business agents and principals of the Respondent to negotiate specific contract terms, and there were also separate meetings between the union business agents and the employees during which the employees were told of the status of negotiations, the benefits of a union contract, and the need to give their assent for representation by the signing of union authorization cards. Thus, according to Christensen, she and Anzinger met with the employees on February 3,[5] and again on February 10, 1999, and all the employees were made aware of the terms of the tentative agreement that had been

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[2] In lobbying Lineco to cover the Respondent's employees pursuant to a contract with the Union, Love wrote to Lineco on February 22, 1999, *inter alia*, as follows:

> The one big difference between Big Sky Locators and another union contractors (sic) is in order for our services to be performed is (sic) we deal strictly with the utility local unions, not the construction locals. We do not construct anything and as such deal only with IBEW Local Unions such as 396 in Las Vegas…

[3] The Union does not represent construction employees; rather it represents employees engaged in utility work.

[4] Prior to this time Love advised his employees that he had arranged for the Union to speak with them, and gave his opinion that a union contract, particularly with Lineco health coverage, would be in their best interest. Love testified that he, too, was not interested in a union contract if his employees did not want to be represented by the Union.

[5] On February 4, 1999, Christensen faxed the Respondent the message "Make check payable to Lineco…," and attached a blank Lineco form, so that the Respondent could list the names and hours of work per week of the Respondent's employees for submission to Lineco. Apparently at this point it was clear that a contract was imminent; and the record evidence shows that in order for medical coverage to begin on March 1, 1999, the effective date of the contract, it was necessary that the employees' accounts with Lineco be "banked" with contributions prior to that date.

reached. By on or about February 12, 1999, the Respondent was so advised that all of its locator employees had signed union authorization cards.[6] The parties executed the contract on February 16, 1999.

The complaint alleges and I find that the appropriate unit herein is as follows:

> All employees performing work within the jurisdiction of the Union in connection with the location and marking of all underground facilities owned and/or maintained by Municipal, county, State, Federal, and Private Utilities including Senior Locator, Locator 1, Locator 2, Locator 3, Locator 4 and Probationary Locator, but excluding all other employees including guards and supervisors as defined in the Act.

Section 12.01 of the contract provides:

> This agreement becomes effective as of the 1st day of March, 1999, and shall continue in full force and effect through February 28, 2001, and shall continue in full force and effect from year to year thereafter unless written notice of termination shall be given by either party to the other at least sixty (60) days prior to the end of the then current term.

Section 12.03 of the contract provides:

> Either party desiring to change or terminate this Agreement must notify the other party in writing at least sixty (60) days prior to the expiration date. When notice of change is given, the nature of the changes desired must be specified in the notice and, until a satisfactory conclusion is reached in the matter of such changes, the original provisions shall remain in full force and effect.

By letter dated January 9, 2001, the Union provided the Respondent with "official notification of our desire to open this agreement in its entirety for negotiations." Clearly this notification was untimely under the terms of the contract as it was given less that sixty days prior to February 28, 2001. Love understood that the notification was untimely, but nevertheless agreed to commence bargaining with the Union. Negotiations extended over a period of time and, according to the testimony of Christensen, the parties had substantially agreed to certain changes but the Respondent would not sign the resulting agreement. On September 28, 2001, the Respondent notified the Union that it no longer considered itself to be a union contractor. According to the explanation of Love, who was not represented by counsel during the hearing, "both Parties had allowed the contract to expire, that we had entered negotiating sessions long after the contract had expired. Those negotiations broke down to the point that we no longer recognized Local 396."

Following September 28, 2001, the Respondent unilaterally discontinued making payments for medical insurance on behalf of the employees to Lineco, unilaterally contracted with a new medical insurance carrier and increased the cost to the employees of such coverage, and unilaterally discontinued the employees' dues deduction remittances to the Union.

[6] The authorization cards, signed between the dates of February 3 and February 12, 1999, by each of the 12 employees who were employed at that time, were introduced into evidence.

C. Analysis and Conclusions

The Respondent contends that the contract between the parties has always been a pre-hire agreement governed by the provisions of Section 8(f) of the Act, and that therefore upon the expiration of the contract the Respondent, having no continuing bargaining obligation or relationship with the Union, could summarily terminate the contract and make unilateral changes to its employees' terms and conditions of employment without violating Section 8(a)(5) of the Act. Further, the Respondent takes the position that the contract did not automatically renew from year to year because, under the circumstances, the Union's belated January 9, 2001 official notification "to open this agreement in its entirety for negotiations," was accepted by the Respondent as a timely, valid, *de facto* termination notice.

Even assuming *arguendo* that, as required under Section 8(f), the Respondent is an "employer engaged primarily in the building and construction industry," and further, that the Union was authorized to enter into 8(f) agreements,[7] it is clear and I find that the Union insisted, and the Respondent agreed, that there would be no collective bargaining agreement absent a 9(a) relationship. Thereupon, over a period of several weeks, the Union simultaneously negotiated a contract favorable to the Respondent and to the employees, and procured valid authorization cards from all the unit employees. Only after the Union advised the Respondent that it had obtained authorization cards from 100 percent of the bargaining unit employees did the parties execute the agreement. There is no contention that the employees were somehow coerced into signing authorization cards or that their actions were anything other than voluntary. Accordingly, I find that in February, 1999, the Respondent recognized the Union as the duly designated collective bargaining representative of a majority of its unit employees, and thus has voluntarily entered into a 9(a) relationship that continued thereafter.

In agreement with the Respondent, I find that the Union's belated "official notification of our desire to open this agreement in its entirety for negotiations," together with the Respondent's willingness to thereafter engage in such negotiations, did constitute a waiver by the Respondent of the time constraint specified in the contract; and, given the expansive nature of the Union's request to reopen the agreement "in its entirety," I find the ensuing conduct of the parties did constitute a *de facto* termination of the agreement under Section 12.01. See *Bridgestone/Firestone, Inc.,* 331 NLRB 205 (2000). As the contract was in effect "terminated" rather than "changed," I find the language of Section 12.03 of the contract regarding "notice of change" to be inapplicable to the instant situation. Thus I find, contrary to the position of the General Counsel and Union, that the contract did not automatically renew for another term.

Clearly, however, following the termination of the agreement, the Respondent was not privileged to withdraw recognition from the Union, or to unilaterally change the contractual terms and conditions of employment without first bargaining to impasse with the Union over such changes. Thus, when an employer and union have established a 9(a) relationship, that union enjoys a presumption of continuing majority support after the expiration of a contract. *Fleming Industries, Inc.,* 282 NLRB 1030, 1034 (1987). The Respondent did withdraw recognition. Further, it did unilaterally discontinue the health coverage under Lineco, and did obtain other health coverage for which the employees were required to contribute, without

[7] I find that the record contains abundant credible evidence that in fact the parties understood that the Respondent was not a construction industry employer and this is why it sought the assistance of the Union herein, namely because it did not represent construction industry employees.

honoring its bargaining obligations. Accordingly, I find that by such conduct the Respondent has violated and is violating Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *Caterair International*, 322 NLRB 64 (1996); *Fleming Industries*, *supra*.

However, after the contract term, that is, after February 28, 2001, I find that the Respondent did not violate the Act by its failure to deduct or remit union dues to the Union as required under the contract. An employer's contractual obligation under a dues checkoff provision does not continue after the expiration of the contract. *Hacienda Hotel, Inc. Gaming Corporation d/b/a Hacienda Resort Hotel and Casino*, 331 NLRB 665 (2000).[8]

The Respondent has maintained in its answer to the complaint, at the hearing, and in its brief, that the resolution of this case should somehow be governed or patterned after a settlement agreement in a case arising in Phoenix, Arizona (Case 28-CA-17241), involving a different IBEW local, which case, according to the Respondent, is factually similar to the instant case. A settlement agreement is entitled to no precedential value whatsoever, and it would be improper to rely upon a settlement agreement as authority for any issue involved in this proceeding. The record evidence presented at the hearing and set forth above governs the resolution of the instant case. Therefore I find no merit to the Respondent's argument or request.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) and (5) of the Act as set forth herein.

The Remedy

Having found that the Respondent has violated and is violating Section 8(a)(1) and (5) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. As it has been found that the Respondent unlawfully withdrew recognition from the Union, unilaterally discontinued the Lineco health coverage of the employees, and unilaterally obtained other health coverage for which the employees were required to contribute, the Respondent shall be required to recognize and, upon request, bargain with the Union for a successor agreement, reimburse Lineco for any health contributions it should have paid on behalf of the unit employees and for any other assessments or interest necessary to make the Lineco health plan whole so that the employees will not have forfeited any coverage, reimburse the employees, with interest, for the contributions they were required to make to the unilaterally established health plan and for union dues that were withheld but not forwarded to the Union, and reimburse the employees for any medical expenses they incurred which would have been covered by Lineco but which were not covered by the plan that was unlawfully placed into effect in place of Lineco. In addition, the

[8] There is some evidence, however, that for a period of time the Respondent may have continued to deduct union dues from the pay of some employees, which dues the Respondent neither submitted to the Union or returned to the employees.

Respondent shall be required to post an appropriate notice at its Las Vegas facility(s), attached hereto as "Appendix."

ORDER[9]

The Respondent, Big Sky Locators, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Withdrawing recognition from the Union as the recognized collective bargaining representative of the Respondent's employees in the following unit:

> All employees performing work within the jurisdiction of the Union in connection with the location and marking of all underground facilities owned and/or maintained by Municipal, county, State, Federal, and Private Utilities including Senior Locator, Locator 1, Locator 2, Locator 3, Locator 4 and Probationary Locator, but excluding all other employees including guards and supervisors as defined in the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Recognize the Union as the collective bargaining representative of the employees in the above-described unit.

(b) Bargain with the Union, upon request, for a successor collective bargaining agreement, and, if an agreement is reached, reduce it to writing and abide by its terms.

(c) Reimburse Lineco for any health contributions it should have been paid on behalf of the unit employees and for any other assessments or interest necessary to make the Lineco health plan whole so that the employees will not have forfeited any coverage.

(d) Reimburse the employees, with interest, for the contributions they were required to make to the unilaterally established health plan, and for any union dues that were withheld but not forwarded to the Union.

(e) Reimburse the employees for any medical expenses they incurred which would have been covered by Lineco but which were not covered by the plan that was unlawfully placed into effect in place of Lineco.

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[9] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Within 14 days after service from the Region, post at the Respondent's Las Vegas, Nevada facility(s) the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 21 days after service by the Regional Office, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: August 27, 2002

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Gerald A. Wacknov
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT withdraw recognition from the Union as the duly recognized and selected collective bargaining representative of employees in the following unit::

All employees performing work within the jurisdiction of the Union in connection with the location and marking of all underground facilities owned and/or maintained by Municipal, county, State, Federal, and Private Utilities including Senior Locator, Locator 1, Locator 2, Locator 3, Locator 4 and Probationary Locator, but excluding all other employees including guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the Union as the duly recognized collective bargaining representative of employees in the above-described unit.

WE WILL, on request, bargain with the Union for a new contract and put in writing and sign any agreement reached on the terms and conditions of employment for our employees.

WE WILL reimburse Line Construction Benefit Fund (Lineco) for any health contributions it should have been paid on behalf of the unit employees and for any other assessments or interest necessary to make the Lineco health plan whole so that the employees will not have forfeited any coverage.

WE WILL reimburse our employees, with interest, for the contributions they were required to make to the health plan that we placed into effect without bargaining with the Union.

WE WILL reimburse our employees for any medical expenses they incurred which would have been covered by Lineco but which were not covered by the plan that was unlawfully placed into effect in place of Lineco.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the foregoing rights guaranteed under Section 7 of the Act.

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BIG SKY LOCATORS, INC
(Employer)

10 Dated: _____ By: _____
(Representative) (Title)

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This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice
40 or compliance with its provisions may be referred to the Board's office, 600 Las Vegas Boulevard South, Suite 400, Las Vegas, Nevada 89101; telephone (702) 388-6416.

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